DEPARTMENT OF STATE REVENUE

03-20160564R.ODR

Final Order Denying Refund: 03-20160564R
Withholding Tax
For Tax Year 2012

NOTICE: IC § 4-22-7-7 permits the publication of this document in the Indiana Register. The publication of this document provides the general public with information about the Indiana Department of Revenue's official position concerning a specific set of facts and issues. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Final Order Denying Refund.

HOLDING

Partnership is liable for collection fees as Taxpayer failed to file withholding returns correctly and failed to timely respond to Department's multiple notices regarding the assessment.

ISSUE

I. Tax Administration - Collection Fees.

Authority: IC § 6-8.1-5-1; IC 6-8.1-8-2; IC § 6-8.1-8-4(a); P/S, Inc. v. Ind. Dep't of State Revenue, 853 N.E.2d 1051 (Ind. Tax Ct. 2006).

Taxpayer seeks a refund of collection fees imposed due to a levy of Indiana withholding tax.

STATEMENT OF FACTS

Taxpayer is an out-of-state partnership with two non-resident partners. Taxpayer previously did business in Indiana. Taxpayer's 2012 Indiana withholding tax liability was $10,662. Taxpayer's two non-resident partners shared this liability. On April 15, 2013, Taxpayer filed a 2012 partnership return and submitted payment of the withholding tax liability. Taxpayer then filed form WH-18s reflecting the amounts withheld for each partner. Taxpayer did not file a WH-1 or a WH-3 reconciliation return for 2012.

In August of 2015 the Indiana Department of Revenue ("Department") determined there was a filing discrepancy and issued Taxpayer a Proposed Assessment concerning 2012 withholding tax plus penalty and interest. Taxpayer did not respond to the Department's Proposed Assessment and the Department issued a Demand Notice for payment in March of 2016. Taxpayer did not respond. The tax liability eventually advanced to the warrant stage and in April of 2016, the Department's third-party collection agency ("collection agency") levied Taxpayer's account.

In an effort to remedy the situation, Taxpayer filed a 2012 WH-3 with a zero balance. In June of 2016 Taxpayer filed a Claim for Refund (Form GA-110L) requesting refund of the entire amount (which consisted of tax, penalty, interest, and collection fees) that was levied. In July of 2016 the Department responded, granting refund of the base tax, penalty, and interest but denying refund of the collection fees.

Taxpayer filed a timely protest requesting refund of the collection fees. An administrative hearing was held, and this Order results. Additional facts will be provided as necessary.

I. Tax Administration - Collection Fees.

DISCUSSION

In the July 19, 2016 letter of Refund Denial, the Department explained in part that "[w]hen a liability advances to a warrant stage, collection fees . . . are retained [by the third-party collection agency]. Hence, collection fees are nonrefundable."

Taxpayer protests the Department's partial refund denial. Taxpayer maintains that it remitted its 2012 withholding tax liability when it timely filed its partnership tax return. Thus, Taxpayer asserts that it is entitled to a full refund because the additional assessment was improper. The issue is whether the partial refund denial was appropriate.

If the Department reasonably believes that a taxpayer has not reported the proper amount of tax due, the

Department shall propose an assessment of unpaid tax based on the best information available to the Department. IC § 6-8.1-5-1(b). The amount of the proposed assessment "is considered a tax payment not made by the due date" and is subject to penalties and interest. Id. Notice of the proposed assessment shall be sent to the taxpayer stating that it has sixty (60) days in which to pay the assessment or file a written protest. IC § 6-8.1-5-1(b) and (d). If the taxpayer does not pay the proposed assessment or file a written protest in the sixty (60) day period "[t]he department shall demand payment, as provided in IC 6-8.1-8-2(a), of any part of the proposed tax assessment, interest, and penalties . . . ." IC § 6-8.1-5-1(j). In these situations, the Department "shall make the demand for payment in the manner provided in IC 6-8.1-8-2." IC § 6-8.1-5-1(k).

IC § 6-8.1-8-2 provides that the Department must issue a demand notice for payment which grants the taxpayer a ten (10) day period of time in which to "either pay the amount demanded or show reasonable cause for not paying the amount demanded." IC § 6-8.1-8-2(a). If a taxpayer "does not pay the amount demanded or show reasonable cause for not paying the amount demanded within the ten (10) day period, the department may issue a tax warrant for the amount of the tax, interest, penalties, collection fee, sheriff's costs, clerk's costs," and other fees. IC § 6-8.1-8-2(b). When it has issued a tax warrant, the Department may contract with a collection agency to collect delinquent tax plus interest, penalties, collection fees, and other fees and costs. IC § 6-8.1-8-4(a). Additionally, "a collection fee of ten percent (10 percent) of the unpaid tax is added to the total amount due." Id. When a tax warrant is filed, "the total amount of the tax warrant becomes a judgment against the person owing the tax." IC § 6-8.1-8-2(e).

In this case, Taxpayer's method of filing and paying their withholding tax liability was incorrect. As stated above, Taxpayer filed and paid its 2012 withholding tax liability when it filed its 2012 partnership tax return. They also filed form WH-18s identifying how much of that tax was withheld for each non-resident partner. According to the 2012 Indiana Partnership Return Booklet:

> If the partnership pays or credits amounts to its nonresident partners only one time each year, it might be permitted to file a designated nonresident withholding return to pay the withholding tax from income distributions made to the nonresident partners. After registering with the online BT-1 and creating a separate one-time distribution withholding account, **submit the WH-1 and the WH-3, filed with WH-18 copies**, electronically.
>
> . . .
>
> The withholding agent must complete and file an annual Withholding Tax Reconciliation Return, Form WH-3, by the end of February following the close of each calendar year. . . . Form WH-3 is used to reconcile the monthly or annual WH-1 returns. When remitting this form, the business must also remit the supporting W-2 and WH-18 reports.

In this instance, Taxpayer timely filed its 2012 partnership return (IT-65), remitting withholding tax for its non-resident partners. Had Taxpayer filed correctly by first filing a WH-1 return with the $10,662 payment, Taxpayer's withholding account would have shown a balance of $10,662. Thus, when the WH-3 reconciliation return was filed showing a liability of $10,662, the two amounts would have reconciled and no assessment would have resulted. Instead, a discrepancy occurred because no WH-1 or WH-3 was filed leaving a zero balance in Taxpayer's withholding tax accounting, however, Taxpayer's WH-18s indicated that withholding tax had been paid. The result was a Proposed Assessment.

The filing of the zero-balance WH-3 remedied the misapplication of the base tax as the zero balance in the withholding account reconciled to the zero-balance WH-3. Because of this reconciliation and the fact that withholding tax was timely remitted, the Department granted refund of the base tax, penalty, and interest. However, by the time the Claim for Refund was filed, the assessment had gone to warrant and had been collected by the collection agency. In such situations, collection fees are retained by the collection agency. The Department does not refund collection fees unless the Taxpayer can prove that the Department was somehow at fault. Taxpayer failed to do so in this case.

Further, Taxpayer did not timely respond to the Department's notice of proposed assessment and demand notice. Taxpayer argues that they never received these notices. In P/S, Inc. v. Ind. Dep't of State Revenue, the tax court concluded that the taxpayer was responsible for paying collection fees because it had not rebutted the presumption that it received the notices which the Department mailed. P/S, Inc. v. Ind. Dep't of State Revenue, 853 N.E.2d 1051, 1054-55 (Ind. Tax Ct. 2006). The court ruled, "when an administrative agency sends notice through the regular course of mail, a presumption arises that such notice is received." Id. at 1054. The court further explained that the taxpayer in that case merely asserted that it had not received notice and that the

Department had explained that it had not received the notices as returned mail. Id.

Similar to P/S, Inc., in this case, Taxpayer merely asserted that they did not receive any notice from the Department. However, Department records indicate and Taxpayer confirmed that Taxpayer's address remained unchanged. The Department's multiple notices were mailed to the same address, which is also listed on Taxpayer's returns. This same address is also listed on Taxpayer's Claim for Refund and the refund check was mailed to this address. The notices and refund check were not returned to the Department by the post office and Taxpayer in fact cashed the refund check. Taxpayer did not file a BC-100 to properly close its withholding account, nor did it provide any other form of notice of address change with the Department.

The Department followed statutory procedure each step of the way. While the collection agency retained a portion of the money as a result of completing its collection effort, the Department refunded Taxpayer the money which the Department received. The collection fees were not retained by the Department and, therefore, in the absence of Department error, the Department is not able to refund the collection fees.

FINDING

Taxpayer's protest is respectfully denied.

Posted: 03/29/2017 by Legislative Services Agency
An html version of this document.